LOS ANGELES COUNTY SHERIFF
CIVILIAN OVERSIGHT COMMISSION MEMORANDUM

TO: Ad Hoc Committee on Deputy Cliques/Secret Societies

FROM: Sean Kennedy

RE: Constitutional Implications of Investigating Deputy Cliques

DATE: April 2, 2010

I. INTRODUCTION

Los Angeles Sheriff Alex Villanueva attended the March 26, 2019, Los Angeles County Sheriff Civilian Oversight Commission (COC) public hearing to address commissioners' concerns about deputy gangs/cliques/secret societies within the Los Angeles Sheriff's Department (LASD).[1] This memo summarizes LASD's offered legal justifications for not investigating deputy cliques and then independently analyzes those justifications.

A. LASD Officials Cite Constitutional Impediments to Investigating Deputy Cliques.

LASD officials asserted that asking deputies if they have clique tattoos would violate their Amendment rights to free expression and association, as well as Due Process. Sheriff Villanueva told the COC that it would be "inappropriate" to ask even his own high-level managers if they have clique tattoos.

Deputy County Counsel Elizabeth Miller asserted that investigating clique tattoos would be difficult because such an investigation implicates the Public Safety Officers Procedural Bill of Rights Act, Govt. Code §§ 3300-3312, and the First Amendment. She confirmed that the working group tasked with investigating the internal cliques has made very little progress.

B. Question Presented: Do the First Amendment and Due Process Prohibit the Sheriff from Investigating Deputy Cliques?

None of the speakers at the COC meeting provided any specific legal authorities in support of their assertions that the First Amendment and Due Process

[1] Different stakeholders use different nomenclature to describe the internal groups. The COC ad hoc committee appears to prefer "cliques," which is term I will use for the remainder of this memo.

prevent them from asking deputies if they have clique tattoos. LASD's characterization of tattooed deputies' free-speech rights as fulsome is contrary to training given to federal agency managers regarding government employees' more limited free-speech rights. Consequently, I researched the following question: Do the First Amendment and Due Process prohibit LASD management from investigating deputy cliques, including whether specific deputies have clique tattoos?

C. Short Answer: There Is No Constitutional Impediment to Investigating All Aspects of Deputy Cliques, Including Clique Tattoos

There are arguments pro and con, but a fair reading of the United States Supreme Court's free-speech/free-expression jurisprudence strongly supports the Sheriff's right to investigate. LASD and County Counsel representatives are significantly overstating the First Amendment and Due Process protections for tattooed deputies, especially if those deputies are associating in cliques and engaging in violent or inappropriate conduct that is likely to damage LASD's relationships with the communities that it serves.

II. LEGAL DISCUSSION

A. First Amendment

The First Amendment prohibits the government from restricting a private citizen's political speech. The only exceptions are "clear and present danger" and content-neutral "time, place and manner" restrictions. Thus, the general proposition that the First Amendment prohibits the State from investigating whether members of the public have clique tattoos is correct. This is true even if a private citizen's tattoos are menacing or highly offensive.

But government employment changes the traditional free-speech equation. *See Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality op.) ("[T]he government as employer indeed has far broader powers than does the government as sovereign."). Government employees have less First Amendment protections than private citizens. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Id.* at 418. This doesn't mean that a public employee has no First Amendment protections. "The Court has made clear that public

employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." Id. at 417.

The United States Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), held that the First Amendment prohibited a school board from terminating a teacher for publicly criticizing school administrators for spending too much money on athletics at the expense of educational programs. While the Court sided with the public school teacher in that case, it clarified that a government employer may restrict an employee's speech if that speech is likely to negatively impact the efficiency of providing its services or otherwise undermine its mission. *Id.* at 573; *see also Connick v. Myers*, 461 U.S. 138 (1983) (same).

Later federal cases have interpreted *Pickering* as authorizing a government agency to regulate without restriction employees' non-political speech. For example, a government employee speaking as an employee about matters directly related to his job duties cannot claim First Amendment protections. *Ceballos*, 547 U.S. at 421 (dismissing prosecutor's §1983 free-speech retaliation claim because there was no First Amendment protection for his job-related assessment of a search-warrant affidavit). Likewise, a government agency has "wide latitude" to regulate employees who speak as a citizen about only "private concerns." *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (holding that termination of police officer who sold videos of himself masturbating in a police uniform did not even meet the "threshold" for First Amendment protection because it was speech concerning only "private matters").

Pickering even allows a government agency to regulate employees speaking as a citizen about matters of "public concern," but it imposes a balancing test to ensure that free speech is not unduly restricted. *Pickering* balancing requires the court evaluating such a free-speech claim to balance the government employee's right to engage in political speech against the government agency's interest in "promoting the efficiency of the public services it performs through its employees." *Id.* at 568. If the employee's political speech interferes with the agency's ability to efficiently provide public services, then the employee's free-speech rights can be regulated without violating the First Amendment. As the cases cited in this memo demonstrate, the Supreme Court has repeatedly approved of regulating a government employee's free-speech rights based on this balancing

test. *See also, CSC v. Letter Carriers*, 413 U.S. 548 (1973), *and Broaderick v. Oklahoma*, 413 U.S. 2880 (1973).

Police officers are subject to the same *Pickering* balancing test as all other government employees. *See Pappas v. Giuliani*, 290 F.3d 143 (2nd Cir. 2002). In *Pappas*, the NYPD fired an officer because of his anonymous dissemination of bigoted racist anti-black and anti-Semitic materials. Pappas sued, asserting that his termination violated his First Amendment right to free expression. The appellate court assumed *arguendo* that Pappas's racist publications concerned public concerns, and then employed *Pickering* balancing to weigh Pappas's right to express his political views against NYPD's need to achieve its mission. The court stressed, "The effectiveness of a city's police department depends importantly on the respect and trust of the community and in the perception in community that it enforces the law fairly, evenhandedly, and without bias." *Id.* at 146. Because Pappas's dissemination of racist materials risked hurting NYPD's relationship with the community, his termination did not violate the First Amendment. *See also Roe*, 543 U.S. at 81 (reasoning that the San Diego Police Department's termination of officer for selling video of himself masturbating in uniform would be justified under *Pickering* balancing because his performance "brought the mission of the employer and the professionalism of its officer into serious disrepute").

In assessing whether a government employee's speech addresses a matter of private or public concern, the court should examine the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 138. Here LASD deputies' desire to keep secret their clique tattoos—presumably to additionally hide their membership in secret cliques—is speech concerning private matters that does not even meet the threshold for *Pickering* balancing. In joining a secret clique, a deputy is not speaking out on matters of public concern about LASD policies and actions activities that are newsworthy or subject to open debate. Rather, the deputies are participating in secret cliques that are, by definition, private. Their goal is to hide, not publicize, their conduct. The Sheriff has "wide discretion" to regulate this type of speech by his employees.

Assuming, *arguendo*, that deputies' desire to keep secret their clique tattoos rises to the level of speech concerning a public matter, *Pickering* balancing still strongly favors LASD's right to investigate and regulate such tattoos. LASD deputies' participation in myriad cliques has generated fifty years' worth of bad press. At least three independent oversight bodies (Kolts Commission, Citizens'

Commission on Jail Violence, and COC) have voiced serious concerns about the cliques and LASD management's failure to address them. There have been scores of lawsuits and settlements regarding violence committed by alleged or admitted clique members. The cliques foment racial tensions inside and outside the department; for example, the Vikings—a clique that U.S. District Judge Terry Hatter once referred to as "neo-Nazi, white supremacist gang"—continues to inspire fear and controversy in South Los Angeles many years after its heyday. Maya Lau & Joel Rubin, *After decades of problems, new allegations surface of a secret clique within L.A. Sheriff's Department*, Los Angeles Times (July 10, 2018).

The longstanding, widespread problems caused by internal cliques demonstrate a substantial need to regulate clique tattoos in order to effectuate LASD's public safety mission. Because the clique tattoos erode trust between LASD and the community, they can be regulated notwithstanding deputies' free-speech rights.

B. Due Process

LASD managers have alternatively asserted that regulating clique tattoos would violate Due Process. The gist of the due process claim appears to be that deputies have a Fourteenth Amendment-protected liberty interest over their personal appearance, including their choice to get clique tattoos.

The United States Supreme Court in *Kelley v. Johnson*, 425 U.S. 238 (1976), rejected a similar Due Process argument by a police officer, who alleged that department regulations concerning hair-length interfered with a protected liberty interest over his personal appearance. The police department justified its hair-length regulation as necessary to maintain uniformity and esprit de corps in a "paramilitary" organization. The lower court rejected that the police department was truly "paramilitary" and held that the regulation violated Due Process.

The Supreme Court reversed, noting that regardless of whether or not the police department was truly paramilitary, it relied on a highly organized structure and chain of command to achieve its public safety mission. Consequently, police department regulations, such as this restriction on hair length, deserved the same deference given to similar military regulations unless there was "no rational connection between the regulation, based as it was on the county's method of organizing the police force, and the promotion of safety of persons and property." *Id.* at 247; s*ee also Kannisto v. City and County of San Francisco*, 541 F.2d 841, 844 (9th Cir. 1976) ("We reemphasize our belief that police department regulations,

while perhaps not directly analogous to those of the military service, are entitled to considerable deference because of the state's substantial interest in creating and maintaining an efficient organization to carry out the important duties assigned by law.").

The Court in *Johnson* also reasoned that because a police officer's "core" free-speech rights can be regulated in the name of achieving public safety, any less well-established liberty interest in controlling one's personal appearance may be regulated on the same basis. 423 U.S. at 245. Thus, any asserted liberty interest in having a secret clique tattoo is minimal at best, and it does not violate Due Process to require deputies to disclose such tattoos.

III. CONCLUSION

LASD has every right to investigate if its employees (whether managers or deputies) have clique tattoos. Indeed, given the most recent allegations of acts of violence committed by the Banditos, it would be irresponsible not to investigate. Neither the First Amendment nor Due Process prohibits LASD management from asking deputies if they have such tattoos.

LASD clearly has the right to inquire about and even make personnel decisions based on whether a deputy has clique tattoos. In fact, other police departments, such as Great Falls (MT) Police Department have already implemented tattoo policies that expressly prohibit "gang" tattoos or tattoos that undermine "department values." Stephen Owsinski, *Inked On-Duty and Police Tattoo Policy: Social Acceptance or Censorship*, OpsLens (Jan. 29, 2018), available at www.opslens.com/2018/01/inked-duty-police-tattoo-policy-social-acceptance-censorship/. Maine State Police prohibits "tattoos or brands" that "may have symbolic meanings that are inconsistent with the values of" the department. *Id.*

Like past sheriffs Sherman Block and Lee Baca, Sheriff Villanueva has downplayed the problems caused by deputy cliques and staunchly refused to investigate them. Having worked in LASD for many years, he may have been socialized to view the cliques as benign fraternities. Or he may simply fear that conducting a full investigation will reveal that top managers are or were members of a controversial deputy clique. Whatever the reason, it is not likely that Sheriff Villanueva will investigate the cliques of his own accord.

Given Sheriff Villanueva's reluctance to investigate, COC should push the Los Angeles County Board of Supervisors to adopt an ordinance requiring all LASD employees to disclose if they have any tattoos so that at the very least LASD may investigate if a deputy's tattoos are associated with a deputy clique.